Nations Rent, Inc. *and* International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO. Cases 25–CA–27257–1, 25–CA–27257–3, 25–CA–27608–1, 25–CA–27613–1, 25–CA–27686–1 amended, and 25–CA–27994–1

July 29, 2003

DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 12, 2002, Administrative Law Judge Margaret M. Kern issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to remand this proceeding to the judge for further findings, analysis, and conclusions consistent with this decision.

The issue before the Board is whether the judge erred in finding that the Respondent complied with a settlement agreement approved by the Regional Director for Region 25 on November 14, 2001, and that, therefore, the settlement agreement should be reinstated and the February 28, 2002 consolidated complaint dismissed. In their respective exceptions, the General Counsel and the Charging Party contend that the judge erred in finding that the Respondent complied with the settlement agreement. For the reasons set forth below, we agree with the General Counsel and the Charging Party. We find, contrary to our dissenting colleague**,** that the Respondent failed to adhere to certain terms of the November 14, 2001 settlement agreement, and that the Respondent's noncompliance warrants setting the settlement agreement aside and reinstating the February 2002 consolidated complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts in brief are as follows. The Respondent is engaged in the sale, service, and rental of construction equipment and supplies. In March 2000, organizer Philip Overmeyer asked union member Jerry Bickel to seek employment at the Respondent's Elkhart, Indiana facility, and if hired, to organize the employees. The Respondent hired Bickel on March 24, 2000. On May 15, 2000, Bickel began discussing the Union with the employees, and in July 2000 employee Ryan Stoll signed an authorization card and participated in the Union's organizing effort.

In July 2000, the Respondent held a series of meetings with the employees to discuss whether there was a need for a union at the Respondent's facility. Between August and September 2000, the Respondent allegedly engaged in unfair labor practices that resulted in charges being filed by the Union in September 2000 claiming various violations of Section 8(a)(1) and (3) of the Act, including the discharges of Bickel[2] and Stoll.[3] The Regional Director issued a complaint based on the above unfair labor practice charges on December 21, 2000.

On April 3, 2001,[4] the parties reached an informal settlement agreement wherein the Respondent promised, among other things, that it would not engage in the following conduct: (1) suspend, discharge, or otherwise discriminate against employees because of their union activities; (2) interrogate employees concerning their union affiliation and sympathies; (3) promulgate, maintain, or enforce rules that prohibit employees from soliciting for the union during nonworking time; and (4) prohibit and/or instruct employees not to wear union buttons or hats. The April 3 settlement agreement resolved, inter alia, the allegations as to Stoll's suspension and discharge.

Subsequently, based on further alleged misconduct by the Respondent, the Union filed additional unfair labor practice charges in May and July, alleging, among other things, that the Respondent unlawfully enforced an overly broad no-solicitation/no-distribution rule; interfered with lawful picketing; and unlawfully issued a disciplinary action report to Bickel and discharged him a second time.[5] On September 20, the Regional Director partially revoked the April 3 settlement agreement and issued a consolidated complaint based on the May and

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] On September 26, 2000, Branch Manager Dan Olinger terminated Bickel for allegedly violating the Respondent's allegedly overly broad no-solicitation/no-distribution rule. District Manager Barry Boggs overruled Olinger's decision and reinstated Bickel the next day.

[3] The Respondent suspended and discharged Stoll on September 23 and 28, 2000, respectively.

[4] All dates are in 2001, unless stated otherwise.

[5] The Respondent allegedly issued a disciplinary action report to Bickel on April 26 for "soliciting and distributing literature for an organization on company property, during working hours." On May 19, Bickel apprised the Respondent, verbally and in writing, that he was going on strike to protest the Respondent's unfair labor practices. By letter dated May 19, the Respondent notified Bickel that it acknowledged and accepted his alleged letter of resignation effective May 19.

July unfair labor practice charges, as well as the September 2000 charges.[6]

On November 14, the Regional Director approved a second informal settlement agreement in which the Respondent agreed that it would not engage in the following conduct: (1) promulgate, maintain, or enforce its written no-solicitation/no-distribution rule in the employee handbook; (2) promulgate, maintain, or enforce rules prohibiting employees from discussing union-related subjects during working hours; (3) interfere with lawful picketing by the Union; (4) interrogate employees; (5) threaten employees with plant closure; (6) inform employees that they could not talk to each other or keep them apart because of their union activities; (7) prohibit employees from wearing union buttons or hats; (8) issue disciplinary action reports because employees engaged in union activities; and (9) discharge or discriminate against employees because of their union activities. The Respondent also agreed to offer Bickel reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and make him whole by payment to him in the amount of $2000. The Respondent further agreed to rescind the disciplinary action report issued to Bickel on April 26; remove from its files any references to the disciplinary action report and Bickel's discharges on September 26, 2000 and May 19; and notify Bickel in writing that the documents were removed from its files and that the disciplinary action report and discharges would not be used against him in any way.

In January 2002, the Union filed an unfair labor practice charge claiming, among other things, that Bickel was treated as a new hire when he was reinstated to his former position on December 10, and that the Respondent failed to pay Bickel for vacation time used prior to his unlawful termination on May 19. On February 28, 2002, the Regional Director issued an order revoking the second settlement agreement and a consolidated complaint that reopened the prior allegations in the previous complaints.

II. THE JUDGE'S DECISION

Before the judge, the General Counsel and the Charging Party argued that the Respondent violated the second settlement agreement by (1) failing to rescind its allegedly overly broad no-solicitation/no-distribution rule; (2) failing to notify Bickel in writing that any references to Bickel's disciplinary action report or his discharges had been removed from the Respondent's files and that the disciplinary report and discharges would not be used against him in any way; and (3) failing to properly reinstate Bickel by treating him as a new hire; and (4) failing to properly make Bickel whole.

The judge found no merit in any of these contentions and concluded that the Regional Director had improperly set aside the settlement agreement. Accordingly, she recommended that the February 28, 2002 consolidated complaint be dismissed.

III. ANALYSIS

For the reasons set forth in the judge's decision, we agree with the judge's rejections of contentions (3) and (4) above. In other words, we agree with the judge that Bickel was properly reinstated to his former position and was properly made whole.

However, for the reasons set forth below, we find merit in contentions (1) and (2). Contrary to the judge and our dissenting colleague, we conclude that the Respondent breached the settlement agreement by continuing to maintain the no-solicitation/no-distribution rule and by failing to notify Bickel in writing of the expunction of his discipline. We also conclude that the Respondent's violation of the settlement warrants setting it aside and reinstating the consolidated complaint.

A. Applicable Principles

We agree with the judge's statement of the applicable legal principles. The Board has long held that "a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed." *Twin City Concrete*, 317 NLRB 1313 (1995), quoting *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1998), enfd. 914 F.2d 1442 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991). Moreover, we have noted that the issue of whether to give effect to or rescind a settlement agreement "cannot be determined by a mechanical application of rigid a priori rules but must be determined by the exercise of sound judgment based upon all the circumstances of each case." *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980) (quoting *Ohio Calcium Co.*, 34 NLRB 917, 935 (1941), enfd. in part 133 F.2d 721 (6th Cir. 1943)).

Here, there is no complaint allegation that the Respondent committed unfair labor practices after the approval of the second settlement agreement. Therefore, our inquiry is limited to whether there has been a failure to comply with the provisions of the second settlement agreement.

B. Alleged Maintenance of the No-Solicitation/ No-Distribution Rule

In the notice attached to the November 14 settlement agreement, the Respondent agreed not to "promulgate,

[6] The Regional Director did not revoke the portion of the April 3 settlement relating to Ryan Stoll.

maintain, or enforce" the following no-solicitation/no-distribution rule:

> Employees may not solicit for organizations, sell goods or services, or distribute catalogs or literature of any kind during working hours, or any time in public areas on Company property. Employees are prohibited from distributing literature of any kind in work areas. Outside third parties are also prohibited from entering Company property to solicit or distribute goods, services, or literature, except as contracted by the Company.
>
> Employees or their relatives who have their own outside businesses are not permitted to sell or solicit on Company premises, other than in the normal context of the customer/vendor relationship through approved purchasing channels. In this context, care must be taken to avoid conflicts of interest or the appearance of any such conflicts.

This rule appeared in the employee handbook most recently published in July 2000.

In December, when Bickel returned to work following approval of the settlement agreement, Bickel received an employee handbook that still contained the no-solicitation/no-distribution rule.[7] The record shows that one of two newly hired employees also received a handbook with the same unchanged rule. When Bickel and the new employee received the handbooks, they also were given a written acknowledgement to sign that stated that the July 2000 handbook represented policies in effect at the time of publication and that the policies in the handbook were subject to change at any time.

The judge found**,** and our dissenting colleague agrees, that while it would have been "the wiser course" for the Respondent to have crossed out the rule before it distributed copies of the handbook after the settlement, the failure to do so does not constitute promulgation or maintenance of the rule in violation of the settlement agreement. In the judge's view, the posted settlement notice in conjunction with the written acknowledgement statement sufficiently communicated to the employees that the Respondent's rule was rescinded. The judge also concluded that the Respondent had no obligation under the settlement agreement to "rewrite, modify or 'clean up'" the handbook rule. While we agree with the judge that the Respondent was not required to promulgate a new rule, we find**,** unlike the judge and our colleague, that the Respondent's continued distribution of the handbook containing the no-solicitation/no-distribution rule constitutes maintenance of that rule in breach of the settlement agreement.

Our dissenting colleague declines to set aside the settlement in light of the posting of the Board's notice "almost contemporaneously with the distribution of the handbook to the two employees." In our view, the posted Board notice, even when considered in conjunction with the acknowledgement statement that the policies in its handbook were subject to change at any time, was insufficient to clearly convey to newly hired employees that the handbook rule had been rescinded. Employees hired after the removal of the posted Board settlement notice who received the unrevised handbook would have had no knowledge that the no-solicitation/no-distribution rule had been rescinded. Thus, we find that the settlement agreement implicitly required that the Respondent delete the no-solicitation/no-distribution rule from the employee handbook. Its failure to do so constituted continued maintenance of that unlawful rule, in violation of the agreement.

Nor do we agree with the judge and our dissenting colleague that the Respondent's posting of a notice stating that the rule would not be maintained or enforced constituted compliance with the settlement agreement. Indeed, the Respondent's simultaneous distribution of the handbook containing the rule and the posting created an ambiguity as to whether the rule was still in effect. As long as the rule still appears in the handbook being distributed, employees could reasonably have believed that the rule remained in full force and effect.[8] This ambiguity in the status of the rule could have discouraged employees from engaging in protected activity.

For these reasons, we find that the Respondent maintained the no-solicitation/no-distribution rule in violation of the settlement agreement. Given the potential impact of the Respondent's conduct on the employees' exercise of their Section 7 rights, we also find the Respondent's breach of the agreement warrants setting it aside and reinstating the February 2002 complaint.[9]

[7] Five days later, the Respondent posted the Board notice stating that the rule would not be maintained. The notice remained posted until May 2002.

[8] We recognize that it may be impractical to immediately remove the rule from extant handbooks. Thus, we would not insist upon such removal. Until a new handbook is printed, we would be satisfied with an "x" through the rule or a notice, on that page, that the rule is no longer in force.

[9] Our dissenting colleague would excuse the Respondent's distribution of the unchanged handbook to the two employees, but notes that he would set aside the settlement agreement if the Respondent continues to distribute the handbook. We find, contrary to our dissenting colleague, that the distribution of the handbook to the two employees was not de minimis, and we would not require additional breaches of the settlement agreement in order to set it aside.

C. Alleged Failure to Provide Written Expungement Notice

In the notice attached to the settlement agreement, the Respondent agreed to notify Bickel "in writing" that it had expunged from its files any reference to the disciplinary action report and the discharges, and that these matters would not be used against him in any way. Although the documents in question were removed from the Respondent's files, it is undisputed that the Respondent failed to provide Bickel written notice that that action had been taken.

Further, at the hearing, an issue arose as to whether Bickel ever received notice of any kind that his file had been expunged. Branch Manager Chad Green testified that he told Bickel that Green had removed everything from Bickel's file having to do with union activity, while Bickel denied being so informed by Green. Resolving what she termed a "significant credibility issue," the judge credited Green's testimony over Bickel's and found that Green informed Bickel that all disciplinary notices had been removed from his file.

The judge acknowledged that the Respondent's failure to provide Bickel written notice that his file had been expunged constituted a breach of its obligations under the settlement agreement. In view of the "Respondent's compliance with all of the other provisions of the agreement," however, the judge concluded that the Respondent's "failure to give Bickel written notice did not so undermine the settlement agreement as to amount to noncompliance."

We disagree. In the preceding section, we concluded, contrary to the judge and our dissenting colleague, that the Respondent has not complied with "all of the other provisions of the agreement." Therefore, we view the Respondent's failure to provide Bickel written notice in a different light.

In cases that involve unlawful discipline and/or discharge, the Board requires an employer to remove any references to its discriminatory action from its files, and notify the employee in writing that this has been done and that the expunged matter will not be used against the employee in any way. *Fort Wayne Foundry Corp.*, 296 NLRB 127 (1989); *Sterling Sugars*, 261 NLRB 472 (1982). The Board's expungement requirement protects an "individual affected by the unlawful conduct [from] subsequent use of files pertaining to such misconduct." *Sterling Sugars*, supra. In addition, a written expungement letter provides an acceptable and uniform method of proving that the charged party has taken the appropriate affirmative remedial action as set forth in a settlement agreement or order. Thus, the written notice requirement serves substantial remedial purposes and is not to be whittled down or taken lightly.[10]

Moreover, in contrast to our dissenting colleague**,** we do not consider oral notification to be an adequate substitute for the written notification requirement. In our view, the failure to provide written expungement notification is not an insignificant or technical violation of a settlement or order. A written expungement notice is not an onerous or ambiguous requirement, and we expect that parties who agree to provide it or are ordered to do so shall provide it. In the settlement agreement at issue here, the Respondent clearly committed to providing that written notice to Bickel but did not do so. See *Low Kit Mining Co.*, 309 NLRB 501, 506–507 (1992), enfd. 3 F.3d 720 (4th Cir. 1993) (failure of the respondent to send the employees written expungement letters provided "ample basis for setting aside the settlement"). Thus, here we conclude that the Respondent breached a basic term of the settlement and that the breach warrants setting aside the settlement agreement for noncompliance.[11]

Conclusion

The General Counsel and the Charging Party have proven that the Respondent failed to comply with material provisions of the settlement agreement. Therefore, we find that the Regional Director acted properly in setting the agreement aside. *Twin City Concrete*, supra. Accordingly, we shall reinstate the February 28, 2002 consolidated complaint and remand the case to the judge to consider the presettlement unfair labor practice allegations and make the necessary findings, analysis, and conclusions.

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[10] Indeed, one reason why the Board requires that the notice be provided in writing is to avoid the very kind of credibility conflict that surfaced in this case as to whether the required notification has been given to the employee.

[11] In support of his argument that the settlement agreement should not be set aside because the Respondent has taken "significant remedial measures" to comply with the provisions of the agreement, our colleague relies on *Deister Concentrator Co.*, 253 NLRB 358, 359 fn. 5 (1980). We find that case distinguishable from the present case. In *Deister*, unlike here, the General Counsel argued that the settlement agreement should be set aside in light of the respondent's subsequent unfair labor practices. (The Board rejected this argument.) In addition, in *Deister*, unlike here, the General Counsel argued that a notice that the respondent posted next to the Board's official notice so undermined the settlement as to amount to noncompliance. It was in the context of rejecting that argument that the Board referred to the "significant remedial actions" that the respondent had taken, and the Board reasoned that those actions would demonstrate to employees that the respondent was abiding by the settlement. Thus, in *Deister*, unlike here, there was no finding that the respondent failed to fulfill specific obligations set forth in the settlement agreement.

ORDER

It is ordered that the February 28, 2002 complaint is reinstated.

IT IS FURTHER ORDERED that the proceeding is remanded to Administrative Law Judge Margaret M. Kern to consider the merits of the underlying unfair labor practice allegations, and prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order consistent with this remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER SCHAUMBER, dissenting.

Unlike the majority, I agree with the judge's decision. In light of the significant remedial measures the Respondent has taken in compliance with the settlement agreement together with the absence of any renewed unlawful labor practices, I am unprepared to set aside the settlement agreement under the circumstances presented. See, e.g., *Deister Concentrator Co.*, 253 NLRB 358 (1980). Respondent's failure to notify Bickel by separate written notification of the expungement from his personnel file of the disciplinary reports, when he was notified orally after the action was taken, does not in my view undermine the settlement agreement to such an extent as to warrant setting it aside. As the judge, however, I pause with Respondent's failure to cross out the offending no-solicitation/no-distribution rule in its handbook. While it clearly would have been preferable for Respondent to have done so, since almost contemporaneously with the distribution of the handbook to the two employees Respondent posted the Board's notice stating that the rule would no longer be given effect, I would not set aside the settlement for this reason. However, if the Respondent was to continue to use its handbook unaltered or without an attached notice expressly deleting the contested no distribution/no solicitation rule, I would set it aside.

Steve Robles, for the General Counsel.
James M. Walters, for the Respondent.
Alexia Kulwiec, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in South Bend, Indiana, on June 3 and 4, 2002.[1] A consolidated complaint issued on December 21, 2000, based upon unfair labor practice charges filed on September 29, 2000, by International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO (Union), against Nations Rent, Inc. (Respondent). On April 3, 2001, the Regional Director for Region 25, approved a settlement agreement resolving the allegations in the December 2000 complaint. On September 20, 2001, an order partially revoking the settlement agreement and a consolidated complaint issued based upon unfair labor practice charges filed on September 29, 2000, and May 21 and 24, and July 2 and 27, 2001. On November 14, 2001, the Regional Director approved a second settlement agreement resolving the allegations of the September 2001 complaint. On February 28, 2002, an order revoking the second settlement agreement and consolidated complaint issued based upon charges filed on September 29, 2000, May 21 and 24, July 2 and 27, 2001, and January 4, 2002.

In the February 2002 complaint it is alleged that since July 2000, Respondent has maintained an unlawful no-solicitation/no-distribution rule in its employee handbook. It is further alleged that on August 8, 2000, Respondent interrogated employees and threatened to close the Company if employees selected the Union as their collective-bargaining representative. It is alleged that on August 8, 2000, Respondent promulgated and has since maintained a rule prohibiting employees from talking about the Union during working hours, and informed employees they were not to talk with one another and would be kept apart because of their union activities. It is alleged that on September 6 and 26, 2000, Respondent instructed employees to remove their union buttons and union hats. It is alleged that commencing on May 21, 2001, Respondent interfered with the Union's ability to engage in lawful picketing. Finally, it is alleged that Respondent discharged Jerry Bickel on September 26, 2000, reinstated him on September 27, 2000, issued a written warning to him on April 26, 2001, and discharged him a second time on May 19, 2001, because of his union activities and because he engaged in an unfair labor practice strike.

The General Counsel contends that Respondent violated the terms of the second settlement agreement in five ways: (1) by failing to reinstate Bickel to his former position without prejudice to his seniority and other rights and privileges; (2) by failing to make Bickel whole; (3) by failing to rescind the disciplinary notice issued to Bickel on April 26, 2001; (4) by failing to notify Bickel in writing that it had rescinded the disciplinary notice and his two discharges; and (5) by continuing to promulgate, maintain and enforce the unlawful no-solicitation/no-distribution rule contained in the employee handbook.

Respondent denies that it violated the terms of the second settlement agreement and maintains that the complaint should be dismissed because the underlying unfair labor practices have been fully remedied. Alternatively, Respondent denies that it engaged in the unfair labor practices alleged in the February 2002 complaint.

[1] At the close of the hearing, counsel for the General Counsel requested that the record remain open pending the investigation of a newly filed charge in Case 25–CA–28107–1. That application was denied, and I adhere to that ruling. The record was left open for the purpose of receiving three W-2 forms. Those forms are hereby made a part of this record as ALJ Exhs. 1(a) through (c).

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent has been engaged in the sale, service, and rental of construction equipment and supplies since 1997. Corporate headquarters are in Fort Lauderdale, Florida, and a regional office is maintained in Columbus, Indiana. Respondent maintains a facility at 1651 Toledo Road, Elkhart, Indiana, the facility involved in this case (the facility). Toledo Road runs in an east/west direction, and the facility is located along the south side of the roadway. A chain link fence that surrounds the facility is situated approximately 30 feet from Toledo Road. There are two gated entrances/exits along Toledo Road; the east gate is a 30-foot sliding gate, and the west gate is a 25-foot swing gate. The 30-foot distance between the fence and Toledo Road is surfaced with limestone-gravel paving.

Respondent employs approximately 10 drivers and service employees. Tim Bontrager is a supervisor, Barry Boggs is a district manager, and Alan Stewart is a human resource manager. Respondent admits that these individuals are supervisors and agents of Respondent within the meaning of the Act. Respondent further admits that Dan Olinger was the branch manager and Chad Green was the assistant branch manager until the fall of 2001, and that they were, until that time, supervisors and agents within the meaning of the Act. Green was promoted to branch manager in September 2001.

On December 17, 2001, Respondent filed a petition for Chapter 11 relief in the Bankruptcy Court, Wilmington, Delaware. That application was still pending at the time of the hearing.

B. The No-Solicitation/No-Distribution Rule

Respondent publishes and distributes an employee handbook. The most recent edition of the handbook, published in July 2000, contains the following provision at page 34:

> Employees may not solicit for organizations, sell goods or services, or distribute catalogs or literature of any kind during working hours, or any time in public areas on Company property. Employees are prohibited from distributing literature of any kind in work areas. Outside third parties are also prohibited from entering Company property to solicit or distribute goods, services, or literature, except as contracted by the Company.

C. The Organizing Attempt

In late March 2000, organizer Philip Overmeyer asked Bickel, a member of the Union, to seek employment at Respondent's facility and, if hired, to organize Respondent's employees. On March 24, 2000, Olinger interviewed and hired Bickel and Bickel began working on April 3, 2000, as a semi-truck driver. From April 3, 2000, to mid-May 2000, Bickel remained covert in his support of the Union. On or about May 15, 2000, he began speaking with employees about the Union.

On July 7, 2000, Respondent conducted a meeting of employees in its showroom. Among those present were Olinger, Boggs, and Bontrager. The film "Little Card, Big Trouble," was shown and there was a discussion about the need for a union at Respondent's facility. It was mentioned that there was an organizing drive going on at one of Respondent's facilities in Detroit and that management wanted to stop the Union before it came to Elkhart. Ryan Stoll, a mechanic who had been hired 2 weeks after Bickel, asked why employees couldn't have a retirement plan and an insurance plan like the Union's plan. He also asked a question about the pay scale.[2]

On July 13, 2000, Overmeyer met with Bickel and Stoll and both signed authorization cards. After this meeting, Bickel continued to talk to employees about the Union. According to both Bickel and Stoll, there were no set lunch or breaktimes for employees. Bickel testified he spoke to employees during lulls in the workday, and he denied interfering with employees' work. On September 18, 2000, Overmeyer sent a letter to Respondent's employees requesting them to attend a meeting on September 25, 2000. The only employee who attended the meeting was Bickel.

Stoll testified that on the morning of August 8, 2000, he was in the shop when he was approached by Bontrager and Olinger. They summoned him into Bontrager's office, and the door was closed. Olinger said he heard Stoll was talking to other employees about the Union, and Stoll said yes. Olinger said that Stoll was not allowed to talk to employees during working time and that he was not allowed to talk during breaks or lunchtime. He also said if Stoll tried to bring the Union in, Respondent would close the doors and that all a union does is take employees' money. Later that morning, Bickel and Stoll were speaking with one another in the parking lot when Bontrager approached them and said that he was supposed to keep them apart and not have them talk to one another. He said Olinger had told him to keep an eye on them and that they were not to talk about the Union. Bickel and Stoll both testified that when Bontrager thereafter saw them talking with one another, he frequently asked if they were having a union meeting. Neither Bontrager nor Olinger testified.

On September 6, 2000, Stoll wore a union button to work which read, "Be Wise, Organize." Olinger told Stoll, in the presence of Bickel, that he had to remove the button because he was not allowed to advertise for the Union on company time.

Prior to September 26, 2000, Bickel and Stoll wore baseball-type caps to work bearing different corporate logos and they observed other employees wearing similar caps. Neither Bickel nor Stoll had been told not to wear these types of caps to work. On September 26, 2000, Bickel and Stoll each wore a baseball

[2] There are no complaint allegations relating to this meeting.

cap with lettering that read, "IUOE, Local 150."[3] Olinger approached them and told them they could not wear the hats. When Bickel asked why, Olinger said that Bickel was insubordinate and that he was in violation of page 34 of the employee handbook. Bickel said it was just a hat, but Olinger stated that it was grounds for termination and that in addition, Bickel was not supposed to speak to anyone or hand out literature during company hours. Bickel asked, "all this for a hat?" Olinger responded, "not for any organizations, that was in the handbook." Green, who was present during this conversation, added that not even a Nike hat could be worn. Bickel asked if he was being fired, and Olinger said, "terminated, by the handbook." Bickel left the premises. Green, the only witness called by Respondent to testify at the hearing, was not asked about this conversation.

On the evening of September 26, 2000, Bickel retrieved a phone message left by Barry Boggs. Bickel called Boggs the following morning and Boggs said that he was overriding Olinger's decision to terminate him and Boggs asked if he would be interested in coming back to work. Bickel said yes and he returned to his regular duties on September 28, 2000. He was fully repaid for the time he was not at work. After he returned to work he wore his union hat on a daily basis. For 6 months following his reinstatement, Bickel worked without incident.

On April 25, 2001, Bickel left a copy of a collective-bargaining agreement on another employee's toolbox and asked him to take a look at it. Later that day, Bickel saw the employee and Olinger standing together looking at the agreement. The next day, April 26, 2001, Bickel was given a disciplinary action report by Olinger that read "soliciting and distributing literature for an organization on company property during working hours. Jerry must stop this immediately." Later that day, Bickel asked Olinger, in the presence of Bontrager, whether the warning meant he could not talk to employees about the benefits of a union. Olinger said it was in the handbook that there could be no solicitation for an organization on company property or on company time, and that if Bickel was talking about an organization, that meant he was not working.

Bickel and Stoll testified that employees regularly engaged in casual, nonwork related discussions while they were working, covering such topics as sports, movies, and politics. Bickel observed employees selling items at work, such as a Notre Dame football helmet and tools, and he observed nonwork related literature on the table in the employee break area, including a sales catalog and a Chicago Bulls game book. To Bickel's knowledge, no employee was told they could not engage in these activities, nor was any employee disciplined for engaging in these activities.

On the morning of May 10, 2001, Olinger again gave Bickel a written warning relating to an incident that occurred on May 7, 2001.[4] The warning stated, in relevant part, "employee told manager that he was distributing literature to customers while on his working time, and stated he will distribute further literature. One customer has confirmed receiving literature . . . Jerry must not distribute literature of any sort while he is working, including while making deliveries, or in work areas. Further violations will subject Jerry to discipline, up to and including immediate discharge." Bickel testified that he had in fact distributed literature to Respondent's customers describing the difference in wage rates between Respondent and union-represented competitors.

D. Bickel's Termination

On the morning of May 19, 2001, Bickel told Olinger that he was going out on strike and he handed Olinger a letter stating that the strike was to protest Respondent's unfair labor practices. The letter further stated that Bickel looked forward to returning to work once the dispute was resolved. Bickel testified that at no time did he tell Olinger, or anyone else, that he was quitting or that he intended to quit. The following week, Bickel received a certified letter from Olinger, dated May 19, 2001, which stated, in relevant part, "I acknowledge receipt and accept your letter of resignation effective May 19, 2001." By certified letter dated June 4, 2001, Bickel wrote Olinger that he had not resigned, that he had gone out on an unfair labor practice strike, and that he wished to return to work upon resolution of the dispute.

E. The Events of May 21–24, 2001

On May 21, 2001, at approximately 6:30 a.m., the Union commenced handbilling and picketing at the facility with signs that read, "IUOE Local 150 AFL–CIO on strike against Nations Rent for unfair labor practices." Ambulatory picketing was also conducted by two full-time staff organizers who followed Respondent's trucks from the facility to jobsites. Overmeyer testified that he specifically advised the staff organizers conducting the ambulatory picketing not to follow anyone home and Overmeyer testified that no employee was followed home to his knowledge. According to Overmeyer, the reason for the strike was the disciplinary action that had been taken against Bickel.

Records of the Elkhart County Public Safety Communications Center reflect at 7:47 a.m. on May 21, 2001, a call was received requesting that a police officer respond to Respondent's facility. Officer James Smith, of the Elkhart County's Sheriff Office, arrived at the facility at 8:30 a.m. and he observed several picketers carrying signs and standing along the south edge of Toledo Road, in the vicinity of the east gate. Officer Smith proceeded to the office where he spoke to Olinger.[5] Olinger wanted to know what the Company's rights were with respect to entrances and exits being blocked, and how close the picketers could be to the Company's property. Smith said the picketers were allowed to remain within a 15-foot public easement measured from the edge of Toledo Road toward the fence. He also said they were not allowed to block the entrances/exits to the company's property. After speaking with Olinger, Smith went outside and spoke to two of the picketers, neither of whom Smith could identify. According to Smith, he told them they could not block the entrances or exits to the

[3] Stoll had been suspended on September 23, 2000, 3 days before this incident. His suspension, and his subsequent discharge on September 28, 2000, were resolved in the first settlement agreement.

[4] This warning is not alleged in the complaint.

[5] Respondent acknowledged in its brief that it was Olinger to whom Officer Smith spoke.

facility, and that they had to remain within the public easement. Smith left the facility at 8:41 a.m.

Robert Barthel is an elderly gentleman who has been retired from the Union for 17 years, and he identified himself as one of the picketers to whom Smith spoke on May 21, 2001. Barthel recalled that Smith told him and another picketer that they had to stay within the public easement, and that they should stay at least four feet from the edge of the pavement for their own safety. Barthel recalled the tone of the conversation as congenial.

On May 22, 2001, Overmeyer and Barthel arrived at the facility at about 6:30 a.m. Both testified that they observed approximately seven large pieces of construction equipment parked along the outside of the fence and extending into the public easement. According to Barthel, the location of the equipment "made it a little difficult" for the picketers to park their cars, but he managed to park his car at least 6 feet from the roadway and within the easement. Barthel testified that notwithstanding the presence of the equipment, the picketers had 50-unobstructed square feet within which to picket. Overmeyer agreed that the equipment made parking a little more difficult, but did not in any way hinder picketing activities.

On May 23, 2001, Overmeyer and Barthel again arrived at about 6:30 a.m. and both observed even more pieces of equipment parked outside the fence than had been parked there the day before. Photographs taken that day reflect six large pieces of equipment parked between the west gate and the east gate, and three large pieces of equipment parked west of the west gate. Barthel acknowledged that the presence of the equipment did not prevent the picketers from parking their cars within the easement, nor did it impair their ability to engage in picketing. Overmeyer, on the other hand, testified "that it was much more difficult for [the picketers] to remain four feet off of the edge of the roadway . . . it was just dangerous." According to Barthel, a large air compressor was running inside the fence and the noise from the compressor made it almost impossible to engage in conversation.

That same morning, the police communications center received a call at 7:12 a.m. requesting that a police officer respond to Respondent's facility. Officer Smith was again dispatched, and when he arrived at 8:05 a.m., he observed the equipment parked outside the fence. He also observed two picketers standing along the edge of Toledo Road, in the vicinity of the east gate, and one or two cars parked within the public easement. Smith passed through the gate and observed a large diesel-powered generator operating in the yard area of the facility, within several feet of the inside of the fence. Smith entered the office and spoke to Olinger. Olinger told him that earlier that morning the picketers' cars had been parked between the easement and the fence, on company property, and that after he called the police the cars had been moved. Olinger suspected the picketers had a scanner set to monitor police communications, and that by using the scanner they were able to move their cars to an area within the easement before the police arrived. Smith testified that Olinger told him that picketers were following trucks to jobsites, and that they were following individuals home at night. According to Smith, Olinger "wanted [him] to look into that or ask [the picketers] about that." Smith told Olinger that the generator noise was so loud that he would not be able to talk to the picketers without shutting it off, and the generator was shut off.

Smith proceeded to talk to two picketers, neither of whom Smith was able to identify. Smith testified that he advised them that a claim was being made that they had moved their cars from where they had been earlier parked outside the easement, and he asked them if they had a police scanner. The picketers denied having a scanner and offered to allow Smith to search their vehicles, which offer Smith declined. Smith told them that it was a misdemeanor to possess a police scanner and a jailable offense. Smith then asked them if they had been following individuals to jobsites and they said they had. He asked them if they had been following individuals to their homes at night and they said they had not. Smith left the facility at 8:22 a.m.

Barthel testified that he was one of the picketers to whom Smith spoke on May 23, 2001. Barthel recalled Smith saying that someone had made a call to the police claiming that the picketers had parked their cars on company property, and that after the call had been made, the cars had been moved. According to Barthel, Smith told him that if he parked his car outside the easement it would be considered trespassing and Barthel could be arrested. Smith also said that someone had suggested that the picketers might have police scanners and that if so, it was illegal under Indiana law and they could be arrested. Smith asked if the picketers were following anyone home, and Barthel said no. According to Barthel, Smith replied that if that happened, it would be considered stalking and they could be arrested. Barthel described the tone of the conversation as congenial. In his testimony, Barthel acknowledged that he had in fact moved his car about 30 minutes before Smith arrived that morning. He claimed to have parked his car within the easement, but when someone came out to get a piece of equipment, he moved his vehicle out of the way. After the equipment was moved he parked his car back in the same spot.

The picketers left Respondent's facility at 4:30 p.m. on May 23, 2001. Overmeyer stayed at the facility until 5:45 p.m., and shortly before he left, he observed several employees come out of the facility and move the equipment back inside the fence. He also observed a straight truck pulling into the facility loaded with scaffolding.

On May 24, 2001, Overmeyer arrived at the facility at 5:30 a.m. He observed that scaffolding had been erected across the entire length of the facility on Toledo Road, with the exception of the two gates. The scaffolding was approximately seven feet high and six feet wide, and it was positioned three feet from the roadway. Yellow caution tape was strung along the edge of the scaffolding closest to Toledo Road. The distance from the fence to the scaffolding was wide enough for a car to drive through. Photographs taken that day show that the public easement was almost entirely blocked by the scaffolding. At first Overmeyer testified there was no place for the picketers to park, but he later admitted that there was a gas station 300 yards east of the facility which had available parking space. Regardless of parking space, however, Overview testified that in his view it would have been too dangerous for picketers to patrol the three feet of the public easement that remained unob-

structed. He sent the picketers home, and no further picketing was conducted.

Following May 24, 2001, Overmeyer drove past the facility on a daily basis except Sundays. He observed that the scaffolding remained in place until June 13, 2001 when it was taken down. At no time did he observe anyone utilizing the scaffolding. Nor did he observe equipment parked outside the fence after May 24, 2001. Bickel similarly testified that from December 10, 2001, when he returned to work, up until several weeks before the hearing in this case, he never again observed large pieces of equipment parked outside the fence.

F. Bickel's Reinstatement

On November 20, 2001, Respondent sent a backpay check for Bickel to the compliance officer for Region 25. The check was in the net amount of $1,563.27, calculated from the amount specified in the second settlement agreement of $2000. Bickel testified he received the check in the first week in December 2001, but that he did not deposit the check for several weeks. As previously noted, Respondent filed for bankruptcy on December 17, 2001, and the check was not honored. Bickel received a replacement check in January 2002 that he successfully cashed.

On the same day that the check was sent to the Regional office, Green sent Bickel a letter offering him reinstatement which Bickel accepted. He returned to work on December 10, 2001, and he reported to Green. Green gave Bickel a copy of the July 2000 edition of the employee handbook and Bickel signed an acknowledgement that he received it. The acknowledgement stated, in relevant part:

> I understand that this Handbook represents only current policies, regulations, and benefits in effect at the time of publication . . . . The Company retains the right to change these policies and benefits as it deems advisable. I understand that it is my responsibility to remain current on Company policies.

Green gave Bickel a "new hire kit" which included tax forms, insurance forms, copies of Respondent's uniform and personal tool inventory policies, and an employee emergency contact information sheet. Green testified the reason he gave Bickel these forms was to make sure the Company had updated information. Green further testified he did not give Bickel an employment application because he was already a current employee with an initial hire date of April 3, 2000. Bickel testified that when he returned to work he maintained his original seniority date of April 3, 2000, and that at no time did Green tell him that he was a new hire.

Bickel has remained continuously employed by Respondent at his former position of semi-truck driver since his reinstatement on December 10, 2001. Bickel testified his job duties and responsibilities, his hours, rate of pay, and all other terms and conditions of employment are exactly the same as they were prior to his discharge on May 19, 2001. He has worn his union hat on a daily basis without incident.

G. Bickel's Vacation Pay

The vacation provision of the employee handbook provides that employees hired between January 1 and June 30, are eligible for 5 vacation days in the year of hire that may be taken after July 1. Employees hired between July 1 and December 31, are not eligible for any vacation days in their year of hire. In the second to fourth calendar years of employment, employees accrue 10 vacation days (80 hours) at the rate of 3.08 hours every biweekly pay period. All vacation time must be taken by December 31 of each calendar year, and accrued but unused vacation days may not be carried over to the next calendar year. Vacation days may be taken in advance of an accrual with a manager's approval, but if a terminated employee has a negative vacation balance, the appropriate number of hours is deducted from the final paycheck.

Bickel testified that in April 2001, he took 40 hours vacation time. Following his discharge, Bickel received his final paycheck for the biweekly payroll period ending May 26, 2001. A deduction was made for 17.2 vacation hours, equaling $223.60.[6] On July 2, 2001, the Union filed a charge in Case 25–CA–27686–1 alleging that Respondent unlawfully withheld wages previously earned by Bickel from his final paycheck. On July 27, 2001, the Union filed an amended charge in the same case. The amended charge repeated the allegation relating to the withholding of wages, and added an allegation that Bickel's discharge on May 19, 2001, was unlawful. On August 27, 2001, the Regional Director dismissed the allegation relating to the withholding of wages, with the following findings:

> The investigation revealed that Bickel had acknowledged receipt of the Employer's Employee Handbook on April 5, 2000 and the Employer's Revised Employee Handbook on July 18, 2000. Both Handbooks clearly define the Employer's policy regarding the allocation of earned, unused leave-time pay to exiting employees and the Employer's policy regarding its deduction of monies paid to exiting employees for used, but unearned leave, from their final paycheck. The evidence shows that the Employer has applied this policy uniformly and has, on other occasions, deducted money from employees' final paychecks for unearned, but used, leave.

In the September 2001 complaint, the discharge of Bickel was alleged, but there was no allegation concerning the withholding of wages. On October 11, 2001, the Office of Appeals upheld the Regional Director's partial refusal to issue a complaint on the wage issue. The Office of Appeals made the following findings:

> [T]he investigation disclosed that the deductions were consistent with Employer policies, and that the Employer has applied those policies to other employees. Accordingly, further proceedings on the appealed portion of the case were deemed unwarranted.

In the second settlement agreement, the Regional Director approved the amount of $2000 as the make-whole amount of money owed to Bickel as a result of his discharge. At the hearing, all parties agreed that $2000 represented approximately 80 percent of the total backpay owed Bickel.

[6] A deduction was also made for 14.7 sick leave hours, equaling $191.10. The General Counsel does not challenge the appropriateness of that deduction.

When Bickel returned to work on December 10, 2001, he inquired about his vacation, and Green said he would get back to him. On December 12, 2001, Stewart sent Green the following memo:

> Chad, when Jerry left the company, he was paid any vacation time owed to him. As he returns, he would be treated the same as any other new hire as far as vacation is concerned. As per the policy in the HR Manager's guide, 'employees hired between July 1st and December 31st are not eligible for any vacation days in their year of hire.' Beginning January 1st of 2002, Mr. Bickel will begin to accrue vacation hours at the rate of 3.08 hours biweekly, and will have 40 hours available on June 30th. We do allow employees to take vacation prior to accruals with the understanding that if they leave the company, this would be considered money owed to the company, and would be withheld from his final paycheck.

H. Notice Posting

Green testified he posted the second settlement notice in the employee breakroom on December 15, 2001, and that it remained posted until the end of May 2002. Green further testified that within a week or two of Bickel's reinstatement, he removed the April 26 and May 10, 2001 warnings from Bickel's personnel file. There were no other disciplinary notices in the file other than these two, and Green told Bickel that he had removed all documents that had to do with union activity from his file. Bickel, on the other hand, denied that Green told him this. Bickel was not given written notice that the records had been removed from his file.

Green testified that since the approval of the second settlement agreement, no employee has been disciplined for violating the no-solicitation/no-distribution rule contained in the July 2000 revision of the employee handbook, and that the rule has not been enforced in any manner. When asked if the rule was currently in effect, Green testified he didn't know. He did acknowledge that since December 10, 2001, two new employees were hired and one of them was given a copy of the July 2000 handbook.

At the end of January 2002, the Union engaged in handbilling at Respondent's facility and erected a 20-foot tall inflatable rat. According to Green, the handbillers stood outside the 15-foot easement, "clearly" on company property. Despite the encroachment, the police were not called and there was no interference with the union's activities.

IV. ANALYSIS

A. Applicable Principles

There is no allegation that Respondent committed unfair labor practices after the approval of the second settlement agreement. The initial inquiry is therefore limited to whether Respondent complied with the second settlement agreement, and only if Respondent is found to have breached that agreement should there be a determination of whether Respondent's pre-settlement conduct violated the Act. *Nudor Corp.*, 281 NLRB 927, 928 (1986). The issue of whether Respondent has complied with the second settlement agreement must not be resolved by a mechanical application of rigid a priori rules, but rather by the exercise of sound judgment based upon all the circumstances of the case. *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980).

B. The Extent of Respondent's Compliance with the Second Settlement Agreement

Respondent complied with the notice-posting requirement of the second settlement agreement, having posted the notice in the employee breakroom from December 15, 2001, to May 2002. In that notice, Respondent committed not to engage in the following eight types of conduct: (1) interrogating employees; (2) threatening employees with closure of the facility because of their union activities; (3) informing employees that they could not talk to each other or that they would be kept apart because of their union activities; (4) prohibiting employees from wearing union buttons, hats or other insignia; (5) interfering with lawful picketing activities; (6) issuing disciplinary reports to employees because of their union activities; (7) discharging or otherwise discriminating against employees because of their union activities; and (8) violating the Act in any like or related manner. The evidence establishes Respondent has fully complied with all of these provisions. Specifically, with respect to item 4, Bickel has worn his union hat to work on a daily basis without incident. With respect to item 5, the credible and uncontradicted testimony of Green is that in January 2002, the Union erected a large inflatable rat and handbilled outside the public easement, on company property. Respondent did not call the police or interfere in any way with this activity.

In the third paragraph of the notice, Respondent committed not to promulgate, maintain or enforce any rule that prohibits employees from discussing union-related subjects during working hours, and further committed not to discriminatorily prohibit union discussions or the distribution of union literature in work areas or public areas. Counsel for the General Counsel does not claim that Respondent has violated the third paragraph of the notice, and I therefore find Respondent has complied with that provision.

C. Respondent's Alleged Failure to Comply re: Employee Handbook Rule

In the second paragraph of the notice, Respondent committed not to promulgate, maintain, or enforce the no-solicitation/no-distribution rule on page 34 of the employee handbook. It is agreed that no employee has been disciplined as a result of the rule. The General Counsel's contention is that Respondent breached the second settlement agreement by its failure to "rescind, rewrite, modify or 'clean up'" the rule.

The only evidence to even suggest that the employee handbook rule has been promulgated or maintained since the approval of the settlement agreement is the fact that Bickel and one of two newly hired employees were given copies of the handbook. When Bickel was given the handbook he was also given a written acknowledgement to sign that stated that the July 2000 handbook represented policies in effect at the time of handbook's publication, and that the policies set forth in the handbook were subject to change at any time. Five days after Bickel signed the acknowledgement Respondent posted the

Board notice stating the rule would no longer be given effect, effectively rescinding the rule.

It certainly would have been the wiser course for Respondent to cross out the provision on page 34 when it gave Bickel and the new employee a copy of the handbook. Its failure to do so, however, does not in my view constitute promulgation or maintenance of the rule in violation of the settlement agreement. Contemporaneous with the distribution of the handbook, Respondent communicated to employees that the policies contained therein were current only as of July 2000 and subject to change at any time. Moreover, from December 2001 to May 2002, the Board notice was posted advising employees the rule was rescinded.

I disagree with the General Counsel that it was incumbent upon Respondent to rewrite, modify or "clean up" the no-solicitation/no-solicitation rule in the handbook. The settlement agreement contained no such requirement. Had the General Counsel wanted Respondent to craft a new rule, he could have incorporated that into the second settlement agreement. The only requirement was for Respondent to cease giving effect to the unlawful rule, not to promulgate a new rule.

D. Respondent's Alleged Failure to Comply re: Bickel's Reinstatement

Respondent agreed in the second settlement agreement to reinstate Bickel to his former position without prejudice, to make him whole by the payment of $2000 to him, to rescind the April 26, 2001 disciplinary notice, to expunge from his file any reference to the disciplinary notice and to his two discharges, and to notify him that the expungement had taken place. The General Counsel contends that Respondent violated these terms in three ways: first, Bickel was reinstated as a "new hire" and was never given assurances that he was being fully reinstated to his former job; second, he was not made whole by reason of the fact that Respondent had withheld $223.60 in vacation money from his last paycheck in June 2001; and third, Respondent failed to notify him in writing of the expungement of records from his file.

1. The new hire issue

Undermining the General Counsel's first argument that Bickel was treated as a new hire is Bickel's own testimony that he was returned to his position as a semitruckdriver, that he performed his job in the same way, that his hours, rate of pay and all other terms and conditions of employment were exactly the same, and that he was accorded his original seniority date of April 3, 2000. Bickel was asked to fill out updated information forms, and was readvised of company policies. He was not, however, asked to fill out an employment application, and he testified he was never told he was a new hire. The General Counsel did not introduce the letter sent by Green to Bickel offering him reinstatement. That letter may or may not have assured Bickel that he was being offered reinstatement to his former position. The General Counsel bears the burden of proof, and this letter would have been probative on this issue.

General Counsel points to the language in Stewart's December 12, 2001 memo stating Bickel would be "treated the same as any other new hire as far as vacation is concerned." As discussed more fully below, the General Counsel does not allege that Bickel was not accorded his full vacation benefits upon reinstatement, and the evidence shows that after his reinstatement, he accrued vacation hours at the proper rate for an employee in his second and third calendar years of employment. Stewart's memo notwithstanding, Bickel was not treated as a new hire and he was reinstated to his former position under the same terms and conditions of employment.

2. The vacation pay issue

General Counsel's second argument, that by deducting $223.60 from Bickel's final paycheck Respondent failed to make Bickel whole, is without merit for several reasons. First, Bickel testified that he took 40 hours vacation in April 2001. He was not asked if he had taken additional vacation hours in 2001, and Bickel's 2001 payroll records were not introduced. According to Respondent's vacation policy, Bickel began accruing 3.08 vacation hours every 2 weeks beginning January 1, 2001, his second calendar year of employment. He, therefore, had accrued less than 40 hours vacation as of the end of April, the month in which he took the vacation. Since he could not carry over vacation time from the previous year, he clearly took vacation time that he had not yet accrued. Pursuant to Respondent's policy, Respondent deducted from Bickel's final check the sum equal to used, but unaccrued leave.[7]

The second reason why the General Counsel's argument is without merit is because the General Counsel entered into the second settlement agreement agreeing that the payment of $2000 to Bickel discharged Respondent's make-whole obligation. That payment, less deductions, was made. The General Counsel was aware, or should have been aware, when it entered into the settlement agreement that a deduction of $223.60 had been made from Bickel's final paycheck, and I must conclude that the General Counsel took this dollar amount into account when it negotiated an 80 percent settlement with Respondent. The General Counsel should now not be heard to say that he made a mistake and that Respondent owes the discriminatee an additional $223.60.

Finally, the appropriateness of the vacation hour deduction was the subject of an unfair labor practice charge filed by the Union that was dismissed, on the merits, by the Regional Director and affirmed by the Office of Appeals. Both the Regional Director and the Office of Appeals based their determination on Respondent's nondiscriminatory application of its policy regarding the deduction of monies paid to exiting employees for used, but unearned leave from their final paycheck. Counsel for the General Counsel stipulated at the hearing that the theory underlying his argument in this case, that Respondent failed to make Bickel whole, is the same theory that the General Counsel found unmeritorious in the context of the ULP charge. I agree

[7] Saturday, May 26, 2001, was the last payroll period that Bickel worked prior to his termination. There were nine biweekly payroll periods between January 1 and the end of April, the month in which Bickel took his 40 hours vacation. Having accrued vacation time at the rate of 3.08 hours every 2 weeks, the most Bickel could have accumulated by the end of April was 27.7 hours. He may have had an even lower balance, depending on when in the month of April he took the vacation, and whether he had taken any vacation time prior to April.

with the General Counsel's previous determination and conclude Respondent did not violate the terms of the second settlement agreement when it failed to reimburse Bickel for the $223.60 deducted from his final paycheck.

3. The expungement issue

Green's credible and uncontradicted testimony is that within a week or two of Bickel's reinstatement, he examined Bickel's file and removed all of the disciplinary notices contained in that file. He also testified that he told Bickel that he had removed everything from his file having to do with his union activity. Bickel's testimony denying that Green told him this presents the only significant credibility issue in this case, and I resolve that issue in favor of Green.

Although I found both witnesses to be generally believable, I found Green more credible than Bickel. On the issue of his vacation pay, Bickel insisted that the deduction from his paycheck was improper. He admitted, however, that he did not know how many vacation hours he had accrued, or whether he had exceeded those hours when he took his April vacation. When asked about Respondent's policy about allowing employees to take unaccrued vacation time, Bickel claimed he was confused. Bickel impressed me as an intelligent witness with good recall. I do not think he was confused at all about his vacation benefits, and I conclude he knew full well that he had exceeded his accrued vacation hours when he took his vacation. His insistence that the deduction from his final paycheck was improper was therefore not credible. Green, on the other hand, was credible and believable throughout his testimony. I therefore find, based on Green's testimony, that Green removed all disciplinary notices from Bickel's file, and that he orally advised Bickel of this fact.

It is agreed that Respondent did not give Bickel written notice that his file had been expunged or that the notices in the file would not be used against him. I find this to be the only breach of Respondent's obligations under the second settlement agreement. Although not to be lightly excused, Respondent did in fact expunge his file and orally told Bickel that this had been done. Moreover, in the notice that Respondent posted for 5 months, during which period of time Bickel was continuously employed, Respondent committed to expunging Bickel's file and further committed that it would not use his previous discipline or discharges against him. In view of Respondent's compliance with all of the other provisions of the agreement, its failure to give Bickel written notice did not so undermine the settlement agreement as to amount to noncompliance. I therefore find the agreement should be reinstated and the complaint dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not fail to comply with the settlement agreement approved on November 14, 2001.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.